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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DOMINIC FABER, Defendant and Appellant.	A113826 (Sonoma County Super. Ct. No. SCR16036)

After a jury determined that defendant Dominic Faber qualified as a sexually violent predator (SVP), the trial court committed him to Atascadero State Hospital for treatment. Defendant appeals, contending only that the evidence was insufficient to establish that he was likely to engage in sexually violent criminal conduct if released. We conclude that defendant's contention is without merit and affirm the commitment order.

BACKGROUND

Under California's Sexually Violent Predator Act (SVPA), a convicted sex offender who has completed his criminal sentence may be civilly and involuntarily committed to a state hospital if he is found to be a "sexually violent predator." (Welf. & Inst. Code, § 6604.) The version of the SVPA in force at the time of defendant's trial defined an SVP as one who "has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent behavior" if released. (Former § 6600, subd. (a)(1).)

Believing that defendant met this statutory definition, the Sonoma County District Attorney (at the request of the Department of Mental Health) commenced proceedings under the SVPA to commit defendant to Atascadero State Hospital. It was alleged in the petition that defendant had four convictions in 1981 and 1990, for forcible rape and forcible rape committed in concert with others (Pen. Code, §§ 261, subd. (a)(2), 264.1).

At trial, each side relied on expert testimony on the issue of whether defendant was likely to reoffend if released. The jury resolved this issue against defendant. Defendant filed a timely notice of appeal from the order of commitment.

DISCUSSION

In his brief, defendant states the limited nature of the issue he seeks to have reviewed: "In order to establish that a defendant is an SVP, the prosecution must prove that: 1) the defendant was convicted of two separate sexually violent offenses; 2) he has a diagnosed mental disorder that makes him a danger to the health and safety of others; 3) the disorder makes it likely that the defendant will engage in sexually violent criminal conduct if released; and 4) the sexually violent conduct will be predatory in nature. [Citations.] At the trial in this case, the defendant essentially conceded that he had committed the two qualifying priors. Nor did the defense strongly challenge the notion that appellant had a diagnosed mental disorder. The heart of the defense was that the disorder did not make it 'likely' that he would reoffend by committing another sexually violent predatory offense. Similarly, in this appeal appellant contends that there was a lack of substantial evidence to support the notion that he would commit another sexually violent offense."

We construe these concessions on the first and second elements, together with the absence of any discussion of the fourth element, to mean that defendant is challenging only the third of the SVPA elements. So construed and narrowed, defendant's argument is solely that the record does not contain substantial evidence from which the jury could legitimately conclude that defendant was likely to commit violent sexual offenses if he was released from custody.

Defendant's challenge is subject to well-established rules guiding our inquiry. "We review sufficiency of the evidence under the SVP[A] according to the same standard pertinent to criminal convictions. [Citation.] We thus review the entire record in the light most favorable to the judgment to determine whether substantial evidence supports the determination below. [Citation.] We may not determine the credibility of witnesses, nor reweigh any of the evidence, and we must draw all reasonable inferences in favor of the judgment below." (*People v. Fulcher* (2006) 136 Cal.App.4th 41, 52; accord, *People v. Sumahit* (2005) 128 Cal.App.4th 347, 352.)

Before deciding whether there is evidence demonstrating that it was likely that defendant would commit violent sexual offenses if released, we note that "likely" in this context has a distinct meaning. Our Supreme Court has held that "likely" means "much more than the mere *possibility* that the person will reoffend;" there must be "a *substantial danger*, that is, a *serious and well-founded risk*," but "likely" does not require a greater than 50 percent probability. (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 916, 922; accord, *People v. Roberge* (2003) 29 Cal.4th 979, 985-988.)

As framed by defendant, the sole issue he contests was the subject of expert testimony by four psychologists—Douglas Korpi, Ph.D., Jack Vognsen, Ph.D., Jeremy Coles, Ph.D., and Shoba Sreenivasan, Ph. D.[1] On the point relevant here, the testimony was in sharp conflict. Dr. Sreenivasan testified that defendant was an SVP; he suffered from "paraphilia not otherwise specified," which is "a sexual deviancy disorder" evidenced by "coercive sexual acts and . . . sadistic features." On the other hand, Drs. Korpi, Vognsen, and Coles concluded that defendant was not an SVP; and that while defendant did have severe antipersonality disorder, he did not suffer from paraphilia.[2]

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[1] Only one of the psychologists, Dr. Vognsen, succeeded in getting defendant's agreement to be interviewed or tested.

[2] Nevertheless, even these experts were hardly adamant about this last conclusion. Dr. Korpi conceded that a paraphilia diagnosis "could be made on the facts in this case," and that "I see some indication of it." Dr. Vognsen testified that "We can't say for certain he doesn't have it, but in my view he doesn't have it . . . clearly enough that I could diagnos[e] him that way." Dr. Vognsen also testified that paraphilia was a "legally justifiable" diagnosis, but one he was uncomfortable with as a matter of personal

The point of difference is important because paraphilics are more likely to reoffend than a person who has just antipersonality disorder.

The issue of defendant's likelihood to reoffend was also based on how the experts interpreted the Static-99 test, an actuarial tool that estimates an individual's risk for sexual and violent recidivism based on static or historical factors. These factors include the number and type of prior offenses, types of victims, age, and marital status. The evaluator identifies the appropriate factors of the subject, and assigns a numeric score to each factor; the total score then indicates the likelihood that the subject will be convicted of a future sex offense. The test uses a scale from 0 to 12, and any score above six places the subject in the "high risk" category, with a 52 percent likelihood of reoffending. The test is widely used in SVPA cases. (E.g., *People v. Williams* (2003) 31 Cal.4th 757; *Cooley v. Superior Court* (2002) 29 Cal.4th 228; *People v. Sumahit*, *supra*, 128 Cal.App.4th 347; *People v. Therrian* (2003) 113 Cal.App.4th 609; *People v. Hubbart* (2001) 88 Cal.App.4th 1202.)

All four of the psychologists determined that defendant was in the highest risk category of the Static-99 tests for reoffending if released, but Drs. Korpi, Vognsen, and Coles were inclined to believe the danger was more likely simple violence rather than gratification of a sexual motivation, or that it was less likely because of defendant's age. In short, Dr. Sreenivasan believed it likely that defendant would reoffend, while the others—by testifying that he was not an SVP—thought he would not.

Defendant contends that "the evidence to support the notion that he would 'likely' commit another sexually violent predatory offense was insubstantial based on the notion that three of four psychologists who testified . . . found that he would not, and based also on his age. At 43 he is even less likely to commit another sexually related offense." (See fn. 2, *ante*.) Defendant claims that his reasoning has the support of a Supreme Court holding in *People v. Reyes* (1974) 12 Cal.3d 486. As he argues, the court in *Reyes* "held

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philosophy. Dr. Coles was "100 percent clear" that defendant had "paraphilic impulses" but, like Dr. Vognsen, he was not in agreement with the legal criteria.

that in a proper case a court should ‘ “appraise the sufficiency and effect of admitted or otherwise indubitably established facts as precluding or overcoming, as a matter of law, inconsistent inferences sought to be derived from weak and inconclusive sources.” ’ (*Id*. at p. 499.) Accordingly, the *Reyes* court reversed the conviction of defendant Venegas ‘[i]n light of the contradictory testimony of three disinterested witnesses, as well as Reyes’ voluntary and convincing trial confession which exculpated Venegas.’ The court discredited ‘Mrs. Penn’s inherently insubstantial testimony as sufficient to incriminate Venegas.’ (*Ibid*.) Appellant submits that the same analysis should apply here. Three of the four . . . expert witnesses could not conclude that appellant was likely to reoffend. That combined with appellant’s age should, appellant submits, cause this [c]ourt to discount the testimony of Dr. Sreenivasan and reverse the SVP finding.” Although defendant’s argument does credit to his counsel’s creativity, if accepted it would amount to a virtual revolution in appellate review.

The jury was instructed with CALCRIM No. 3530 that “You are the sole judges of the evidence and believability of witnesses,” and with CALCRIM No. 226 that “You alone must judge the credibility or believability of the witnesses. . . . You may believe all, part, or none of any witness’s testimony. Consider the testimony of each witness and decide how much of it you believe.” CALCRIM No. 301 told the jury that “The testimony of only one witness can prove any fact.” The jury was also given CALCRIM No. 302, that in evaluating conflicting testimony “What is important is whether the testimony . . . convinces you, not just the number of witnesses who testify about a certain point.”

These are among the most fundamental powers of the finder of fact—whether it be jury or judicial officer—at a trial. A proper respect for those powers underlies some of the elemental principles of appellate review. We are concerned here with the concept expressed in CALCRIM No. 302.

The concept is hardly novel. On the contrary, it was codified in the early days of our state. In 1872, when it enacted the Code of Civil Procedure, the Legislature specified that “The jury . . . are the judges of the effect or value of evidence addressed to them . . . .

They are . . . to be instructed by the court on all proper occasions: [¶] (2) That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number . . . satisfying their minds . . . ." (Code Civ. Proc., former § 2061[3].) There would be little point to citing all of the decisions endorsing the universality of the principle, so we note only a portion of them in the margin.[4] It is one of those principles that are so "elementary [that] their mere statement is conclusive of their correctness." (*People v. Spencer* (1922) 58 Cal.App. 197, 224.)[5]

The principle that "Witnesses are not counted, but rather their testimony is weighed" (*Shannon v. Mt. Eden Nursery Co., Inc*. (1933) 134 Cal.App. 591, 592; accord, *Baucom v. Baucom* (1914) 25 Cal.App. 108, 109 [citing Jones on Evidence (1914 ed.) § 900]) was respectable even before California became a state. In 1827, Jeremy Bentham wrote in his Rationale of Judicial Evidence: "Nothing can be weaker than the best security that can be derived from numbers. In many cases, a single witness, by the simplicity and clearness of his narrative, . . . will be enough to stamp conviction on the most reluctant mind. In other instances, a cloud of witnesses, though all were to the same fact, will be found wanting in the balance." (Quoted in VII Wigmore on Evidence

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[3] Although in 1965, the Legislature repealed former section 2061 when it enacted the Evidence Code (Stats. 1965, ch. 299, § 127, p. 1366), the Law Revision Commission in its comment to the repealing legislation stated: "As the section is but a partial codification of the common law, the repeal should have no effect on the giving of the instructions contained in the section . . . ." (Cal. Law Revision Com. com., 7 West's Ann.Code Civ. Proc. (1965 ed.) foll. § 2061, p. 358.)

[4] E.g., *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885 & fn. 8 [quoting CALJIC No. 2.22]; *Nichols v. Pacific Electric Ry. Co*. (1918) 178 Cal. 630, 631-632; *Fowden v. Pacific Coast Steamship Co*. (1906) 149 Cal. 151, 161; *McNeill v. Stitt* (1905) 2 Cal.App. 13, 14; see 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 311, p. 356.

[5] The only hint of criticism is that the principle may be so obvious that stating it to the jury borders on the insulting. (See *People v. Hahn* (1922) 58 Cal.App. 704, 707 ["it may be of no assistance to the jury, involving as it does a mere legal platitude"]; *People v. Maughs* (1908) 8 Cal.App. 107, 122 ["It ought not to be necessary to tell a jury . . . of average intelligence that they need not accept the testimony of any number of witnesses if such testimony does not convince them of the truth"].)

(Chadbourn rev. ed. 1978) § 2033, p. 340.) Bentham was describing how the common law had jettisoned the "numerical system" of the Middle Ages, which purported to decide the "truth" of a litigant's position by the number of witnesses willing to support it on oath. (*Id*. §§ 2032-2034.)

Nevertheless, defendant is pretty plainly asking this court to go back to the Middle Ages because he had three witnesses on his side while the prosecution had only one. Equally plainly, we decline to make the trip. There are already two decisions involving the SVPA that implicitly reject defendant's contention. One is *People v. Scott* (2002) 100 Cal.App.4th 1060, 1062-1064, which held that the testimony from a single expert was sufficient for a jury verdict and the commitment order. The other is *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 329, where the court reiterated the most basic rule for appellate review of witnesses at trial: "[A] purely numerical standard for . . . a [commitment] proceeding would deprive the trier of fact of the opportunity to make a *qualitative* assessment of the experts' opinions. As the opinions accumulate, such an analysis becomes ever more important and desirable; it is not the number of opinions that matters, but their persuasiveness." Moreover, as already mentioned, review for substantial evidence does not allow an appellate court to determine the credibility of witnesses, or reweigh their testimony. (*People v. Fulcher*, *supra*, 136 Cal.App.4th at p. 52; *People v. Sumahit*, *supra*, 128 Cal.App.4th at p. 352.)

Reyes does not command a different result. The ultimate issue there was whether Venegas was actually present at the crime with Reyes. As characterized by Justice Kaus, "in *Reyes* the conviction was reversed because the case against [Venegas] consisted entirely of circumstantial evidence which could be said to support the conviction only by arbitrary application of a series of tenuous hypotheses." (*People v. Thomas* (1979) 87 Cal.App.3d 1014, 1018-1019.) Unlike "Mrs. Penn" in that case, none of the expert testimony here can be dismissed as "inherently insubstantial." And there is certainly nothing like a repudiated confession from a codefendant. Nothing in the 33 years since *Reyes* was decided inclines us to believe that it changed the landscape of appellate review.

The jury obviously accepted Dr. Sreenivasan's testimony that defendant was likely to commit a sexually violent offense if released. That testimony constitutes substantial evidence in support of their verdict. (Evid. Code, § 411.) With this determination, our function is concluded.

DISPOSITION

The order of commitment is affirmed.

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Richman, J.

We concur:

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Haerle, Acting P. J.

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Lambden, J.

A113826, *People v. Faber*